Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Parts 10, 24, 112, 123, 134, 144, 145, 148, 162, 172, 191

(T.D. 86-118)

Conforming Amendments to the Customs Regulations

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: In accordance with Customs policy of periodically reviewing its regulations to ensure that they are current, this document makes certain conforming changes which are necessary because of various executive, legislative, and administrative actions. Several of the changes are the result of Customs continuing efforts to reduce the paperwork burden on the public. The changes merely conform the regulations to existing law or practice. They are nonsubstantive and essentially are precedural.

EFFECTIVE DATE: June 20, 1986.

FOR FURTHER INFORMATION CONTACT: Marvin M. Amernick, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8237).

SUPPLEMENTARY INFORMATION:

Background

As part of a continuing program to keep its regulations current, the Customs Service has determined that various executive, legislative, and administrative actions require conforming amendments to the Customs Regulations contained in Chapter I, Title 19, Code of Federal Regulations (19 CFR Chapter I). Following is a list of these actions, the affected sections of the regulations, and the necessary changes.

Discussion of Changes

1. Section 10.7(a), Customs Regulations (19 CFR 10.7(a)), relating to substantial containers or holders used for the transportation of merchandise, begins with the phrase, "Except as provided for in

§ 10.2(b)". T.D. 75–230, published in the Federal Register on September 18, 1975 (40 FR 43021), amended Part 10, Customs Regulations (19 CFR Part 10), by deleting § 10.2. Section 10.7 is being amended to remove reference to this deleted section.

2. Section 10.74, Customs Regulations (19 CFR 10.74), provides procedures relating to animals which stray or are driven across a U.S. border. Before such animals may be returned, they must be held for such inspection and treatment as deemed necessary by a representative of the Agricultural Research Service of the Department of Agriculture. Customs has been informed that such inspections are now conducted by the Animal Plant and Health Inspection Service of the Department of Agriculture. Therefore, § 10.74 is being amended accordingly.

3. Section 10.76, Customs Regulations (19 CFR 10.76), concerns the importation of game animals and birds. Customs Form 3315, Declaration for Free Entry of Game Animals or Birds Killed by United States Residents, has been in use to facilitate the admission into the U.S. of dead game animals and birds, free of duty without entry. The volume of use of CF 3315 averages only 21,000 per year and functionally duplicates U.S. Fish and Wildlife Service Form 3–177, Declaration for Importation or Exportation of Fish or Wildlife. Therefore, the Customs Regulations are being amended to remove reference to CF 3315, which is now obsolete. U.S. Fish and Wildlife Service Form 3–177 will be substituted in its place.

4. Section 10.177, Customs Regulations (19 CFR 10.177), contains criteria to be used in establishing whether or not a product was produced in a beneficiary developing country for purposes of the Generalized System of Preferences (19 U.S.C. 2461 *et seq.*). It has been noted that rather than just quoting the word "country", in § 10.177(a), the phrase, "produced in the beneficiary developing country" should be quoted. Therefore, § 10.177(a) is being amended accordingly.

5. Section 24.17, Customs Regulations (19 CFR 24.17), sets forth the schedule of reimbursable expenses that parties-in-interest must repay to Customs for services rendered by Customs officers or employees. Section 24.17(f) refers to the reimbursement to Customs to cover the Medicare costs of employees. By T.D. 85–70, published in the Federal Register on April 17, 1985 (50 FR 15271), the percentage of reimbursable compensation expenses that must be repaid to cover Customs share of Medicare costs was raised from 1.3 to 1.35. Section 24.17(f) is being amended accordingly.

6. Section 112.15, Customs Regulations (19 CFR 112.15), states that approvals and discontinuances of carriers' bonds will be published from time to time in the weekly CUSTOMS BULLETIN. However, information on the status of bonded carriers is now available on-line at the district and port offices through the Automated Commercial System (ACS) computer. In addition, a monthly computer listing is mailed to the Customs offices. This on-line bonded carrier

system efficiently disseminates bonded carrier information to the offices needing such information and makes continued publication in the CUSTOMS BULLETIN unnecessary. Therefore, § 122.15 is being removed. In addition, the automated bond control system which went into effect with the revision of the Customs bond structure by T.D. 84–213, published in the Federal Register on October 19, 1984 (49 FR 41152), further eliminates the need for the bond lists and also instruments of international traffic bond lists. Accordingly, § 10.41a, Customs Regulations (19 CFR 10.41a), relating to instruments of international traffic, where reference is made to the publication of these bond lists in the CUSTOMS BULLETIN, is also being amended.

7. Section 123.72, Customs Regulations (19 CFR 123.72), provides for the admission into the U.S. without entry or payment of duty of allegedly stolen or embezzled vehicles, trailers, airplanes, or component parts of any of them, being returned from Mexico. This provision was based on an agreement between the U.S. and Mexico dated October 6, 1936. A new agreement entitled, "The Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft" (Treaties and Other International Agreements [TIAS] 10653), which entered into force on June 28, 1983, now controls this situation. Section 123.72 is being amended to update the reference.

8. Section 134.55, Customs Regulations (19 CFR 134.55), refers to the compensation of Customs officers and employees who are assigned to supervise the exportation, destruction, or marking of articles so as to exempt them from the application of marking duties for failure to either mark articles or their container with the name of the country of origin of the article in accordance with § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304). Section 134.55(b) incorrectly states that the compensation is to be figured according to § 19.5(b), Customs Regulations (19 CFR 19.5(b)). The correct reference is § 24.17(a)(3), Customs Regulations (19 CFR 24.17(a)(3)), which states that importers of such merchandise shall be charged the full compensation and authorized travel and subsistence expenses of such officers or employees from the time they leave their official station until they return thereto. Section 134.55(b) is being amended accordingly.

9. Section 108 of Pub. L. 95–410 (92 Stat. 888), the Customs Procedural Reform and Simplification Act of 1978, amended §§ 557 and 559, Tariff Act of 1930, as amended (19 U.S.C. 1557 and 1559), to permit merchandise to remain in a Customs bonded warehouse at the owner's expense for a period of up to 5 years, without any futher extension. By T.D. 79–221, published in the Federal Register on August 9, 1979 (44 FR 46794), § 144.5, Customs Regulations (19 CFR 144.5), was amended to establish a 5-year time limit, commencing from the date of importation, on the storage or merchan-

dise in a bonded warehouse. An exception was made for merchandise in the bonded warehouse on the date of enactment of Pub. L. 95–410, October 3, 1978. For such merchandise the 5-year period began on that date. Since the 5 years covered by this exception have expired, and no extensions are allowed, §§ 144.5 and 144.36 are being amended to remove these exceptions.

10. Section 144.32, Customs Regulations (19 CFR 144.32), contains procedures for making withdrawals from Customs bonded warehouses. Section 144.32(c) refers to applications by "proprietors" to make withdrawals. It has come to Customs attention that some confusion may result from the word since persons other than warehouse proprietors can make applications for withdrawals, and in fact, proprietors usually are not the persons making the applications. Accordingly, § 144.32(c) is being amended to remove the word, "proprietors".

11. Section 206 of Pub. L. 98–573, the Trade and Tariff Act of 1984, amended § 498(a)(1), Tariff Act of 1930, as amended (19 U.S.C. 1498(a)(1)), by increasing the informal entry limit from $250 to $1,250. However, it exempted all articles valued in excess of $250 classified in Schedule 3, parts of Schedule 7, and Parts 2 and 3 of the Appendix of the Tariff Schedules of the United States Annotated or any other article for which formal entry is required without regard to value. Under 19 U.S.C. 1498(a)(1), the Secretary of the Treasury may specify the exact amount of the informal entry limit. The limit may vary for different classes or kinds of merchandise or different classes of transactions. After thorough consideration of the issue, it was determined that, with the exception of the specific exclusions, the informal limit for all articles would be set initially at $1,000, with the option to increase it to $1,250 in the future. This change was reflected by amending various sections of the Customs Regulations as part of another document published as T.D. 85–123 in the Federal Register on July 13, 1985 (50 FR 29949). It has now been determined that §§ 145.4 and 148.23, Customs Regulations (19 CFR 145.4, 148.23), must also be amended to reflect this change.

12. Section 115 of Pub. L. 97–446 amended Subpart A of Part 2 of Schedule 8 of the Tariff Schedules of the United States Annotated (19 U.S.C. 1202), to raise the personal exemption allowed residents returning to the U.S. Items 813.30 and 813.31, TSUS, were amended to raise from $300 to $400 the exemption allowed residents returning, and from $600 to $800 for residents arriving directly or indirectly from American Samoa, Guam, or the Virgin Islands of the U.S. This change requires numerous amendments to Part 148, Customs Regulations (19 CFR Part 148).

13. In § 162.75, Customs Regulations (19 CFR 162.75), relating to limitations on seizures for violations of § 592, Tariff Act of 1930, as amended (19 U.S.C. 1592), an error was made in the numbering of some paragraphs. Paragraphs currently numbered § 162.75(d)(3) (1)

and (2) should be designated § 162.75(d)(3) (i) and (ii). The section is being corrected accordingly.

14. Part 172, Customs Regulations (19 CFR Part 172), contains provisions relating to liquidated damages incurred under the provisions of any bond posted with Customs. Section 172.33(c)(1) erroneously refers to the payment of "penalties and withheld duties" prior to filing a second supplemental petition contesting a decision concerning liabilities under a bond. The phrase should be "liquidated damages". Section 172.33(c)(1) is being amended accordingly.

15. Part 191, Customs Regulations (19 CFR Part 191), contains the general provisions and specific procedures relating to drawback claims. Throughout Part 191, various forms have been used to document transactions to determine their compliance with the drawback regulations. Customs has recently begun use of a new form, Customs Form 331, Manufacturing Drawback Entry and/or Certificate, which replaces nine forms previously used. Several sections within Part 191 are being amended to remove references to the obsolete forms.

Inapplicability of Public Notice and Delayed Effective Date Provisions

Inasmuch as these amendments merely conform the Customs Regulations to existing law or practice, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

Executive Order 12291

Because this document will not result in a "major rule" as defined by § 1(b) of E.O. 12291, the regulatory analysis and review prescribed by the E.O. is not required.

Inapplicability of Regulatory Flexibility Act

This document is not subject to the provisions of §§ 603 and 604 of Title 5, United States Code, as added by § 3 of Pub. L. 96-354, the "Regulatory Flexibility Act". That Act does not apply to any regulation, such as this, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551, *et seq.* or any other statute.

Drafting Information

The principal author of this document was John E. Doyle, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects

In General
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19 CFR PART 10
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19 CFR PART 172
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Drawback.

AMENDMENTS TO THE REGULATIONS

Parts 10, 24, 112, 123, 134, 144, 145, 148, 162, 172, and 191, Customs Regulations (19 CFR Parts 10, 24, 112, 123, 134, 144, 145, 148, 162, 172, and 191), are amended as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The authority citation for Part 10 continues to read as follows:
AUTHORITY: 19 U.S.C. 66, 1202, 1481, 1484, 1498, 1623, 1624.

§ 10.41a also issued under 19 U.S.C. 1322.

§§ 10.171–10.178 also issued under 19 U.S.C. 2461 *et seq.*

2. Section 10.7(a) is amended by removing the opening phrase, "Except as provided for in § 10.2(b),", and by changing the word "substantial" to "Substantial".

3. Section 10.41a is amended in the following manner:

(a) In paragraph (c), introductory text, the sentence, "The fact of approval and discontinuance of bonds on Customs Form 301, containing the bond conditions set forth in § 113.66 of this chapter will be published in the weekly CUSTOMS BULLETIN.", is removed.

(b) In paragraph (c)(1), the phrase, "published in the weekly CUSTOMS BULLETIN", is removed, and the word, "established" inserted in its place.

(c) In paragraph (c)(2), the phrase, "published in the weekly CUSTOMS BULLETIN", is removed from both places it appears, and the word, "established", inserted in both those places.

(d) In paragraph (c)(3), the word, "published" is removed from both places where it appears, and the word, "established" inserted in both places.

4. Section 10.74(c) is amended by removing the phrase, "Agricultural Research Service" and inserting, in it's place, "Animal Plant and Health Inspection Service".

5. Section 10.76(d) is amended by removing "Customs Form 3315", and inserting, in its place, "U.S. Fish and Wildlife Service Form 3-177, Declaration for Importation or Exportation of Fish or Wildlife".

6. Section 10.131 is amended by removing the phrase, "or Part 54 of this chapter".

7. Section 10.177(a) is amended by removing the quotation marks from the word "country" and placing quotation marks around the phrase, "produced in the beneficiary developing country" so the phrase appears as it does in the paragraph heading.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority citation for Part 24 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624; 31 U.S.C. 9701.

§ 24.17 also issued under 19 U.S.C. 261, 267, 1450, 1451, 1452, 1456, 1524, 1557, 1562; 46 U.S.C. 2110, 2111, 2112.

2. Section 24.17(f) is amended by removing the number, "1.3" and inserting, in its place, "1.35".

PART 112—CARRIERS, CARTMEN, AND LIGHTERMEN

1. The authority citation for Part 112 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1551, 1565, 1624.

2. All other statutory authority cited at the end of the index and various sections in Part 112 is removed.

3. Part 112 is amended by removing § 112.15.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

§ 123.1 also issued under 19 U.S.C. 1459;

§ 123.2 also issued under 19 U.S.C. 1460;
§ 123.3 also issued under 19 U.S.C. 1459;
§ 123.4 also issued under 19 U.S.C. 1484, 1489;
§ 123.7 also issued under 19 U.S.C. 1498;
§ 123.8 also issued under 19 U.S.C. 1448, 1450–1454, 1459;
§ 123.9 also issued under 19 U.S.C. 1460, 1584, 1618;
§ 123.11 also issued under 19 U.S.C. 1465;
§§ 123.12–123.18 also issued under 19 U.S.C. 1322;
§§ 123.21–123.23, 123.25–123.29, 123.41, 123.51 also issued under 19 U.S.C. 1554;
§ 123.24 also issued under 19 U.S.C. 1551;
§§ 123.31–123.34, 123.42, 123.52, 123.64 also issued under 19 U.S.C. 1553;
§ 123.63 also issued under 19 U.S.C. 1461, 1462;
§ 123.71 also issued under 19 U.S.C. 1595.

2. All other statutory authority cited at the end of the index and various sections in Part 123 is removed.

3. Section 123.72 is revised to read as follows:

§ 123.72 Treatment of stolen vehicles returned from Mexico.

District directors shall admit without entry and payment of duty allegedly stolen or embezzled vehicles, trailers, airplanes, or component parts of any of them, under the provisions of The Convention between the United States of America and the United Mexican States for the Recovery and Return of Stolen or Embezzled Vehicles and Aircraft (Treaties and Other International Acts Series [TIAS] 10653), of June 28, 1983, if accompanied by a letter from the U.S. Embassy in Mexico City containing:

(a) A statement that the Embassy is satisfied from information furnished it that the property is stolen property being returned to the U.S. under the provisions of the convention between the U.S. and Mexico concluded January 15, 1981, and

(b) An adequate description of the property for identification purposes.

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for Part 134 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1304, 1624.

2. Section 134.55(b)(1) is amended by removing, "§ 19.5(b)", and inserting, in its place, "§ 24.17(a)(3)".

PART 144—WAREHOUSE AND REWAREHOUSE ENTIRES AND WITHDRAWALS

1. The authority citation for Part 144 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1484, 1557, 1559, 1624.

§ 144.3 also issued under 19 U.S.C. 1563;

§§ 144.33, 144.37 also issued under 19 U.S.C. 1562.

2. All other statutory authority cited at the end of the index and various sections in Part 144 is removed.

3. Section 144.5 is revised to read as follows:

§ 144.5 Period of warehousing.

Merchandise shall not remain in a bonded warehouse beyond 5 years from the date of importation.

4. Section 144.32(c) is amended by removing the word, "proprietors".

5. Section 144.36(a) is amended by removing the comma and the phrase, "including any lawful extension thereof." after the word, "period", and inserting a period.

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

§ 145.4 also issued under 18 U.S.C. 545; 19 U.S.C. 1618.

2. Section 145.4(c) is amended by removing "$250" and inserting, in its place, "$1000".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

1. The authority citation for Part 148 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1498, 1624. The provisions of this part, except for Subpart C, are also issued under 19 U.S.C. 1202 (Gen. Hdnote 11).

§ 148.51 also issued under 19 U.S.C. 1321.

2. Sections 148.12, 148.17, 148.31–148.38, 148.51, 148.101, 148.104, 148.111 and 148.113 are amended by removing "$300" or "$600", wherever they appear and inserting, in their place, "$400" or "$800", respectively.

3. Section 148.23(c) is amended in the following manner:

(a) In the heading to subparagraph (1), "$250" is removed, and, "$1,000 (with exceptions)" is inserted, in its place.

(b) In subparagaph (1), "$250" is removed, and, "$1,000 (except for articles valued in excess of $250 classified in Schedule 3, Parts 1, 4A, 7B, 12A, 12D and 13B of Schedule 7; items 772.30 and 772.35; and Parts 2 and 3 of the Appendix of the Tariff Schedules of United States Annotated)", is inserted, in its place.

(c) In the heading to subparagraph (2), "$250 but not over $500" is removed, and, "$1,000 (with exceptions)" is inserted, in its place.

(d) In subparagraph (2), "$250 but not over $500" is removed, and, "$1,000 (except for articles valued in excess of $250 classified in Schedule 3, Parts 1, 4A, 7B, 12A, 12D and 13B of Schedule 7; items 772.30 and 772.35; and Parts 2 and 3 of the Appendix of the

Tariff Schedules of the United States Annotated)" is inserted, in its place.

PART 162—RECORDKEEPING, INSPECTION, SEARCH AND SEIZURE

1. The authority citation for Part 162 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624. Subpart G also issued under 19 U.S.C. 1466, 1584, 1592, 1613, 1618.

2. Section 162.75 is amended by redesignating paragraphs (d)(3)(1) and (d)(3)(2), as (d)(3)(i) and (d)(3)(ii), respectively.

PART 172—LIQUIDATED DAMAGES

1. Tha authority citation for Part 172 continues to read as follows:

AUTHORITY: 5 U.S.C. 66, 1623, 1624.

2. Section 172.33(c)(1) is amended by removing "penalties and withheld duties", and inserting, in its place, "liquidated damages".

PART 191—DRAWBACK

1. The authority citation for Part 191 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1313, 1624.

2. Section 191.2(h) is amended by removing the last sentence, and inserting, in its place, "Depending on the type of drawback applied for, entries are filed on Customs Form 331, 7512, or 7539".

3. Section 191.2(p) is amended by removing the last sentence, and inserting, in its place, "A Manufacturing Drawback Entry and/or Certificate, Customs Form 331, when properly completed, may serve as an abstract of manufacturer's record".

4. Sections 191.62(a)(1) and (2) are revised to read as follows:

§ 191.62 Filing Procedure.

(a) *Manufacturing Drawback Entry and/or Certificate.*—(1) *Customs Form 331.* The drawback claimant shall file with the appropriate district director the manufacturing drawback entry and/or certificate in duplicate on Customs Form 331, if claiming under 19 U.S.C. 1313(a) or (b). The district director may require an additional copy for administrative use.

(2) *Customs Form 331—Additional Uses.* The drawback claimant shall file with the appropriate district director the original drawback entry on Customs Form 331 in the two instances listed below. The district director may require an additional copy for administrative use.

(i) *Certificates of manufacture filed prior to entry.* When the drawback claimant files a certificate of manufacture prior to the

filing of the entry, he shall file the entry on Customs Form 331 and refer to the certificate of manufacture in the entry by the official number instead of describing the particulars of importation and manufacture.

(ii) *Purchase of manufactured articles for exportation.* A purchaser of a completely manufactured article who exports it and claims drawback shall file an entry on Customs Form 331.

(3) * * *

(4) * * *

* * * * * * *

5. Section 191.65 is revised to read as follows:

§ 191.65 Certification of delivery.

(a) *When required.* If the merchandise used in the manufacture of the exported articles was not imported by the manufacturer of the articles, no drawback shall be allowed until the drawback claimant files with the regional commissioner where the claim is to be liquidated a manufacturing drawback entry and/or certificate in duplicate on Customs Form 331, or official evidence of the existence of the form filed at another place. The form must describe the merchandise delivered, tracing it from the custody of the importer to the custody of the manufacturer.

(b) *Intermediate transfer.* If the merchandise was not delivered directly from the importer to the manufacturer, each intermediate transfer shall be described on the manufacturing drawback entry and/or certificate (Customs Form 331), certified by the person through whose possession the merchandise passed.

(c) *Consignee as importer.* When the consignee named in an entry summary declares another person to be the actual owner, the consignee shall be considered the importer for drawback purposes, even though the consignee files an owner's declaration under § 485(d), Tariff Act of 1930, as amended (19 U.S.C. 1485(d)). The drawback claimant shall file a manufacturing drawback entry and/or certificate (Customs Form 331), showing the initial transfer from the consignee to the person to whom delivery was made.

(d) *Warehouse transfer and withdrawals.* The person in whose name merchandise is withdrawn from a bonded warehouse shall be considered the importer for drawback purposes. No manufacturing drawback entry and/or certificate (Customs Form 331) is required covering prior transfers of merchandise while in a bonded warehouse.

6. Section 191.66 is revised to read as follows:

§ 191.66 Certificates of manufacture and delivery.

(a) *When required.* If the imported merchandise has undergone some process of manufacture before delivery, and the wholly or partially manufactured article thereafter is used in the manufacture of some other article for exportation, or when completely manufactured articles are purchased for exportation without further

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manipulation, the drawback claimant, whether the manufacturer or the exporter, shall file a manufacturing drawback entry and/or certificate on Customs Form 331.

(b) *Subcontractors.* If a subcontractor performs work, which for drawback purposes does not constitute a manufacture or production, with the use of merchandise the principal plans to make the subject of a drawback claim, and if there is a problem in identifying the merchandise the subcontractor returns to the principal from the merchandise received from the principal, the subcontractor shall complete a manufacturing drawback entry and/or certificate (Customs Form 331). If there is no problem of identification, the subcontractor shall complete only the delivery section of the form. If complementary records are maintained by a subcontractor's principal (see § 191.22(d)), and Customs determines no problems of identification exist, it may waive the filing of Customs Form 331 for transfers between principal and subcontractor, whether the subcontractor's operation involves manufacture or not.

(c) *Identifying manufacturing drawback entry and/or certificates.* Drawback claimants may identify the relevant manufacturing drawback entry and/or certificates on drawback entries covering the exported articles rather than describe the importation and manufacture.

(d) *Certification of immediate transfer.* Any intermediate transfer of manufactured articles shall be certified on the manufacturing drawback entry and/or certificate (Customs Form 331).

(e) *Entry filed at place other than where certificate filed.* If the drawback entry is filed at a place other than where the manufacturing drawback entry and/or certificate (Customs Form 331) is on file, the regional commissioner may transmit to the place where the drawback entry is filed an extract on Customs Form 4537.

(f) *Special requirements for agency transactions.*—(1) *Requirement of agent.* Each agent manufacturer who conducts operations under § 191.34 shall furnish the principal for whom it processed merchandise a manufacturing drawback entry and/or certificate (Customs Form 331) completing only the portion applicable to the operation so conducted, relating to the substituted or designated merchandise, and identifying the owner of the articles for whom processing was conducted.

(2) *Requirements of principal.* The principal for whom processing was conducted under § 191.34 shall complete and file a manufacturing drawback entry and/or certificate (Customs Form 331) and attach it to the forms from its agents or agent.

7. Section 191.82(e) is revised to read as follows:

§ 191.82 Procedure.

* * * * * * *

(e) *Customs Form.* The Manufacturing Drawback Entry and/or Certificate (Customs Form 331) shall be used in place of the corre-

sponding forms used in the case of articles manufactured with the use of imported merchandise.

* * * * * * *

8. Section 191.84(c) is revised to read as follows;

§ 191.84 Alcohol, Tobacco and Firearms certificates.

* * * * * * *

(c) *Request accompanied by Customs Form 331.* If the request is accompanied by Customs Form 331 showing any of the information required by paragraph (d) of this section, that information need not be repeated in the request.

* * * * * * *

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 2, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 20, 1986 (51 FR 22513)]

U.S. Customs Service

General Notices

Importations Bearing Recorded U.S. Trademarks; Solicitation of Public Comment on Gray Market Policy Options

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Solicitation of public comment on "gray market" policy options.

SUMMARY: This document solicits public comment concerning the importation of parallel imports, or so-called gray market goods, which are products manufactured overseas bearing genuine trademarks that are purchased from foreign retailers of wholesalers and imported into the U.S without the permission of the individual or corporation who owns the rights to the trademark in the U.S. market. Customs regulations traditionally have interpreted existing U.S. law to permit these goods to enter the U.S. when the foreign and American owners of the trademark are "related." Three U.S. Courts of Appeal have reached different conclusions concerning the validity of the regulations.

A previous solicitation for comments on the economic effects of gray market imports was published in the Federal Register on May 21, 1984 (49 FR 21453), and an extension of the comment period was published on July 20, 1984 (49 FR 29509).

This notice solicits information regarding two alternative approaches to the gray market that have been suggested which might address certain of the economic problems created by parallel imports. The alternatives are mandatory labeling and mandatory removal of the trademarks (i.e., demarking) of such imports. Information is sought on the economic soundness of these alternatives, including the possible ways to implement them, the problems and costs associated with their implementation, and the relative effectiveness of the approaches. We are soliciting information whichu will facilitate a cost-benefit analysis to determine whether mandatory demarking or labeling is in the public interest.

DATE: Comments and/or data are requested on or before August 18, 1986.

ADDRESS: Comments may be submitted to and inspected at the Regulations Control Branch, U.S. Customs Service, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Steven Pinter, Entry, Licensing & Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5765).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The statutory framework affecting the importation of foreign articles bearing registered trademarks, so-called "parallel imports" or "gray market goods", is contained in § 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526) and § 42 of the Lanham Trademark Act (15 U.S.C. 1124). The Customs Regulations implementing these statutes are set forth in Part 133 of Title 19, Code of Federal Regulations (19 CFR Part 133). The Customs Regulations permit any person to import foreign manufactured articles bearing genuine trademarks where: (1) Both the foreign and U.S. trademark are owned by the same person or business entity; (2) the owners of the foreign and domestic trademarks are parent and subsidiary companies or are otherwise subject to common ownership or control; or (3) the articles bear a trademark applied under authorization of the U.S. trademark owner. Otherwise the regulation prohibit importations of such articles without the consent of the U.S. trademark owner and provide for the seizure and forfeiture of such articles.

The controversy over these gray market goods prompted Customs, in cooperation with other government agencies, to publish a notice soliciting economic data on the short and long term effects of such importations. A previous solicitation for comments on the economic effects of gray market imports was published in the Federal Register on May 21, 1984 (49 FR 21453), and an extension of the comment period was published on July 20, 1984 (49 FR 29509).

Two alternatives to the gray market situation have been suggested that might address certain of the economic problems allegedly created by parallel imports. The alternatives are mandatory labeling and mandatory removal of the trademarks (i.e., demarking) of such imports. The purpose of this notice is to solicit information on the economic soundness of these alternatives, including the possible ways to implement them, the problems and costs associated with their implementation, and the relative effectiveness of the approaches. We are soliciting information that will facilitate a benefit-cost analysis to determine whether mandatory demarking or labeling is in the public interest.

U.S. trademark law encourages investment in the manufacture and distribution of products by protecting the reputation or goodwill established by trademark owners. It also protects the public from mistake, deception, and confusion with regard to a product's

source. U.S. trademark owners obtain protection against imported goods that infringe their trademarks through a Federal registration system which gives persons or corporations owning trademarks in the U.S. the right to have the Customs Service exclude at the U.S. border imports that bear marks that would copy or simulate a trademark registered with the Patent and Trademark Office in the U.S.

Sometimes separate entities own the U.S. and foreign rights to a particular trademark. Since 1922, U.S. law has prohibited the importation of products manufactured overseas bearing genuine trademarks that are registered in the U.S. unless express consent is received from the owner of the U.S. trademark at the time the product enters the U.S. The Customs Service, in its regulations, however, has traditionally interpreted the law to recognize a "related party" exception to this general statutory prohibition. This exception permits products manufactured overseas bearing genuine trademarks to enter the U.S. without the permission of the U.S. trademark owner in cases where the foreign manufacturer is "related" to the U.S. trademark owner, e.g., is a parent, subsidiary, or licensee. (See 19 CFR 133.21). This frequently results in importations by third parties who are typically beyond the contractual control of the foreign manufacturer and its related U.S. trademark owner. These genuine trademarked products are imported into the U.S. and are often sold to U.S. consumers at discount prices. The volume and scope of these imports have increased in recent years due, in part, to the comparatively high value of the U.S. dollar, making the Customs "related party" exception a contentious issue with U.S. trademark owners.

Section 133.21, Customs Regulations, was upheld in *Vivitar Corp.* v. *United States,* 761 F.2d 1552 (Fed. Cir. 1985), cert. denied, 106 S. Ct. 791 (1986) and in *Olympus Corp.* v. *United States,* No. 85–6282 (Second Cir. June 9, 1986), but were found unlawful in *Coalition to Preserve the Integrity of American Trademarks* v. *United States,* No. 84–5890 (D.C. Cir. May 6, 1986) (COPIAT). Proceedings in the *COPIAT* and *Olympus* cases are still ongoing.

Proponents and opponents of maintaining the traditional Customs policy have each contended that their approach will best serve the interests of U.S. consumers. Proponents of maintaining the "related party" exception contend that the regulation frustrates efforts by multinational firms to price discriminate against U.S. consumers. If such firms seek to charge consumers in the U.S. a higher price than their foreign counterparts charge for the same trademarked product, the "related party" exception allows arbitrage, i.e., the resale or transfer of the product by unrelated third parties from the foreign country to the U.S., where it is sold at prices below those charged by dealers authorized by the U.S. trademark owner. In such cases, the traditional Customs policy results in greater availability of the trademarked product and lower prices

to U.S. consumers. Proponents argue further that if the "related party" exception did not exist, the Federal government would become the *de facto* enforcer of multinational firms' decisions to price discriminate against U.S. consumers.

On the other hand, opponents of traditional Customs policy contend that the "related party" exception harms American consumers in two ways. First, opponents contend, it discourages U.S. trademark owners from investing in marketing or servicing of trademarked products by permitting others to "free ride" on these investments. For example, a U.S. trademark owner or a U.S. distributor of a trademarked good may be discouraged from investing in services, such as comprehensive warranty service for the product, if "free riders" can sell and distribute the same trademarked product without bearing the costs of such warranty. Second, opponents argue that the influx of gray market goods may deceive or confuse consumers about the source of trademarked products and therefore about the quality or availability of warranties on those products. Consumers may assume that all goods bearing a particular trademark are covered by uniform service warranties or are uniformly backed by the reputation of the same firm, regardless of who resells or distributes them.

Policy Options

Labeling and demarking have been proposed as policy alternatives as a means of preserving most or all of the beneficial arbitrage effect, while at the same time ameliorating undesirable free rider and consumer confusion effects that might exist. As a result, the Economic Policy Council seeks additional information on the following:

(1) *Labeling:* Mandate Federal labeling requirements on parallel imports, either on the imported goods or at the retail place of purchase.

(2) *Demarking:* Require the trademark on parallel imports to be "demarked," i.e., removed or obscured, prior to importation to the U.S.

Questions

The Economic Policy Council has asked that the following questions with regard to the labeling and demarking options be published for public comment.

In responding to these questions, commenters are strongly advised to provide, to the fullest extent possible, systematic, verifiable data (and sources) that give more than anecdotal support for any arguments or positions presented. Commenters are encouraged to provide data or information for as broad a range of product markets as possible.

Labeling. The following questions relate to mandatory labeling of parallel imports.

1. What is the most effective, practical approach for mandatory labeling of parallel imports?

a. What information should the label provide?

b. Should the label requirements be uniform for all parallel imports or differ depending upon the product involved?

c. Should the label be affixed to the product, container or both?

d. Who should be required to affix the label and how should it be affixed?

e. Who would perform the enforcement function? How would it be performed? Where would it be performed?

f. What remedies and/or penalties should be available for failure to label properly a parallel import?

g. Describe any other factor that should be addressed in considering regulations or legislation mandating labeling.

2. What are the costs of mandatory labeling?

a. What would be the increased cost to the government, to the importer, to the distributor, to the manufacturer, to the consumer?

b. What would be the volume of goods affected?

c. What would be the effect of the labeling requirement on the ability of parties to purchase trademarked goods abroad, import them into the U.S. and sell them at a cost lower than that of the authorized distributor? Does it vary among different goods? Are there any goods for which the effect would be to halt or significantly impair the parallel imports?

d. Are there any other costs associated with mandatory labeling?

3. What are the benefits of mandatory labeling?

a. Describe the evidence demonstrating the existence and significance of any consumer information problems that may result from the gray market. To what extent would the requirement address consumer confusion or deception problems resulting from parallel imports? Would these labels be read? To what extent would the existence of the label change consumers' purchasing decisions?

b. How easy would it be to circumvent a mandatory labeling requirement?

c. Are there any other benefits that should be considered?

4. Are there any other factors that are relevant to or affect parallel imports that have not been cited herein but that should be taken into account when formulating a policy on labeling of such goods?

Demarking

5. What is the most effective, practical approach for demarking parallel imports?

a. Should the demarking requirement be uniform for all parallel imports or differ depending upon the products involved?

b. How should products be demarked? Should demarking apply to the product, its container, or both? Must the trademark be removed or would covering it be sufficient? Must the covering be permanent?

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c. Are there products that cannot be demarked at all or cannot be demarked without doing serious damage to the product? If so, how should these products be treated?

d. Who would enforce the demarking regulation? How would it be enforced? Where would it be enforced?

e. What remedies and/or penalties should be available for failure to properly demark a parallel import?

6. What are the costs of mandatory demarking?

a. What is the increased cost of demarking to the government, to the importer, to the distributor, to the manufacturer, to the consumer?

b. What would be the volume of goods affected?

c. What would be the effect of the demarking requirement on the ability of firms to purchase trademarked goods abroad, import them into the U.S. and sell them at a cost lower than that of the authorized distributor? Would it vary among different goods? Are there cases where the effect would be to halt or significantly impair parallel imports?

d. Would a demarking requirement affect the manner or extent to which owners apply trademarks to goods? Would it affect the design of products?

e. Are there any other costs associated with mandatory demarking?

7. What are the benefits of mandatory demarking?

a. Describe the evidence demonstrating the existence and significance of any consumer information problems that may result from the gray market. To what extent would mandatory demarking address the free rider or consumer confusion or deception problems resulting from parallel imports? What relevant information could retailers tell consumers (in advertisements or face-to-face) concerning a parallel import? Could the product be advertised as identical to the trademarked product? How would the ability to provide this information affect any potential benefits of demarking?

b. How easy would it be to circumvent this requirement?

c. Are there any other benefits that should be considered?

8. Are there any other factors that are relevant to or affect parallel imports that have not been cited herein but that should be taken into account when formulating a policy on demarking of such goods?

Comparison of Labeling and Demarking

9. Compare the costs, and benefits of mandatory labeling and mandatory demarking. Which of these approaches would be better?

COMMENTS

Comments and/or data submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between

9:00 a.m. and 4:30 p.m. on normal business days, at the Regulations Control Branch, Room 2426, U.S. Customs Service Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The background explanation and questions contained in this document were prepared by the President's Economic Policy Council. However, personnel from the Customs Service and Treasury Department participated in its development.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 13, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 17, 1986 (51 FR 22004)]

Performance Review Boards: Appointment of Members

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This notice announces the appointment of additional members of the U.S. Customs Service Performance Review Boards (PRB's) in accordance with 5 U.S.C. 4313(c)(4). The purpose of the PRB's is to review senior executive employees' performance and make recommendations regarding performance ratings and performance awards.

DATE: The additional memberships on the Performance Review Boards are effective as of this date.

FOR FURTHER INFORMATION CONTACT: Jerry L. Padalino, Director, Office of Human Resources, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 1134, Washington, D.C., (202) 377-9205.

SUPPLEMENTARY INFORMATION: There are two Performance Review Boards in the U.S. Customs Service. The additional members will serve on the Performance Review Board that reviews Senior Executives rated by the Commissioner and Deputy Commissioner. By Notice published in the Federal Register on May 15, 1986 (51 FR 17849), the U.S. Customs Service identified the other individuals who will serve as members. The additional members are as follows:

Raymond A. Fontaine, Comptroller, General Services Administration;

Joseph H. Linnemann, Associate Comptroller, U.S. Department of State;

Michael T. Schmitz, Chief Counsel, U.S. Customs Service;

Stuart I. Smith, Executive Director, Public Buildings Service, General Services Administration.

Dated: June 11, 1986.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

[Published in the Federal Register, June 17, 1986 (51 FR 22005)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-735)

UNITED STATES OF AMERICA, APPELLEE *v.* PRIORITY PRODUCTS, INC., and WALTER L. AND ROSALIE E. HUSS, APPELLANTS

Stephen Delgiudice, of Washington, D.C., argued for appellants. *Michael R. Totaro* and *Maureen J. Shanahan,* Totaro and Shanahan, of Beverly Hills, California, were on the brief for appellants.

Platte B. Moring, III, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee. With him on the brief were *Richard K. Willard,* Assistant Attorney General and *David M. Cohen,* Director, *Patricia Olson,* District Counsel, U.S. Customs Service, of Seattle, Washington, of counsel.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

(Appeal No. 86-735)

UNITED STATES OF AMERICA, APPELLEE *v.* PRIORITY PRODUCTS, INC., and WALTER L. AND ROSALIE E. HUSS, APPELLANTS

(Decided June 16, 1986)

Before MARKEY, *Chief Judge,* NEWMAN, *Circuit Judge,* and SWYGERT, *Senior Circuit Judge.**

SWYGERT, *Senior Circuit Judge.*

The issue presented in this case is whether the United States Customs Service's failure to name corporate officers in their individual capacities in written administrative pre-penalty and penalty notices issued pursuant to 19 U.S.C. § 1592(b) (1982) precludes suit against them in the Court of International Trade to recover a penalty originally assessed only against the corporation. The trial judge held that it did not, and we affirm.

*Honarable Luther Merritt Swygert, U.S. Senior Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION

I

On October 1, 1982, pursuant to section 1592(b), the Portland, Oregon District Director of the United States Customs Service ("Customs Service") issued a pre-penalty notice regarding the allegedly fraudulent importation of bark tea from Brazil in September 1982. The notice was addressed and mailed to Priority Products, Inc. ("Priority"). On October 6, 1982 the Food and Drug Administration issued a notice of detention of the bark tea and hearing relating to the same transaction. At that time, Walter L. Huss and Jack Meligan each owned fifty percent of the shares of Priority. Walter Huss was chairman of the Board of Directors, Meligan was president, and Rosalie E. Huss (Walter's wife) acted as secretary. Priority had no other directors, officers, or employees.

On October 28, 1982 Walter and Rosalie Huss attended a meeting with the District Director of the Customs Service regarding the pre-penalty notice. By then Meligan had severed his relationship with Priority. Walter Huss became president, and the Husses were the sole shareholders of the corporation. After the October 28 meeting Walter Huss mailed a letter, which he signed as president of Priority, to the District Director acknowledging and summarizing the meeting and presenting his position.

On April 19, 1983 a summons to appear and produce records was issued addressed to "Mr. Walter Huss, Priority Products Corp." In response to the summons, on May 4, 1983, Walter Huss appeared at the offices of the Customs Service and submitted a written statement signed by "Walter Huss" to the special agent in charge of the investigation. In that statement, Huss wrote that he had hired an attorney as the special agent had advised, that the agent should contact Huss' attorney, and that Huss was aware that the agent had made a charge of "fraud" against him. He also stated that "my property" had been improperly seized and detained by the Customs Service. On May 17, 1983 the Customs Service issued a penalty notice to Priority, with a cover letter addressed to "Walter L. Huss, President," imposing a penalty of $61,301.

Mr. Huss' attorney filed a petition for relief on August 9, 1983 on behalf of Priority. In that petition Huss' attorney wrote that Huss had been informed by the United States Attorney that the Customs Service was recommending that Mr. and Mrs. Huss be prosecuted criminally for fraud in connection with the importation. Huss' attorney addressed the minimal role the Husses had played in Priority's operations prior to November 1, 1982, and the exculpatory nature of the Husses' involvement in the importation. On that same day Huss also submitted a petition for relief to the United States Attorney in Portland, Oregon; it is unclear in what capacity he signed that petition. In it he wrote first that the District Director of Customs has alleged that the "Defendant, Walter Huss," is

guilty of fraud and second that the "administrative criminal charges of fraud * * * brought by the Government * * * are first against Walter Huss and only secondly * * * against Priority Products."

The Customs Service responded by letter dated January 30, 1984 to "Priority Products, Inc., attention Mr. Walter Huss," stating that it was referring the matter to Customs Service's headquarters for review and determination. On April 10, 1984 the Customs Service sent another letter to "Priority Products Corporation" indicating that the assessed penalty had been mitigated to $16,260 and that Priority had sixty days within which to pay the penalty. Within that sixty-day period Huss filed a "criminal complaint" and affidavit of information on behalf of himself against, *inter alia*, agents of the United States Customs Service. It is unclear whether Priority or the Husses refused to pay the penalty. But because the penalty remained unpaid by the end of the sixty-day period, on September 21, 1984, the United States ("the Government") brought suit against Priority, and against Mr. and Mrs. Huss, individually, in the Court of International Trade pursuant to 28 U.S.C. § 1582. At the time of the filing of the complaint, Priority was in involuntary dissolution. The Husses were each served with a copy of the complaint. Shortly thereafter, each of them signed their answer to the complaint "for Priority Products and themselves" in which they challenged the subject matter jurisdiction of the court.

The Husses subsequently filed a motion for summary judgment on the grounds, *inter alia*, that the court lacked subject matter jurisdiction over that part of the complaint against them because they had not been named in their individual capacities in the written pre-penalty and penalty notices. They also claimed that this failure violated their right to due process under the fifth amendment.

The Government responded, disputing these claims. However, it requested that, in the event the court found the Husses' arguments to be meritorious, the trial be delayed to permit the Customs Service to complete the administrative process with respect to the Husses.

The court denied the Husses' motion, holding that nothing in the statute, 28 U.S.C. § 1582 (1982), compelled compliance with the written notice procedures in 19 U.S.C. § 1592 as to every party that might ultimately be called upon to pay the penalty assessed against the corporation and that, in any event, the evidence demonstrated that the Husses had sufficient information from which a reasonable person would conclude that the Customs Service intended to pursue them in their personal capacities. The court further held that there had been no due process violation because the Husses had actual notice that they might be sued in their personal capacity and because they had taken advantage of every adminis-

trative remedy in their personal capacities that was available to them under section 1592 of Title 19.

The case proceeded to a trial before a jury, the first jury trial ever held in the Court of International Trade. In that case, the Government presented evidence that Rosalie Huss, with the consent of her husband but without Meligan's knowledge, attempted to import the bark tea into the United States. The Husses presented evidence that they were not personally responsible for the attempted importation. At the end of the presentation of all the evidence, the jury was instructed on the circumstances under which corporate officers such as the Husses could be held personally liable for actions taken in the name of a corporation. The jury found all three defendants, the Husses and Priority, jointly and severally liable for a penalty of $30,000.

II

On appeal the Husses do not complain about any errors in the conduct of the trial itself. They claim only that the judgment as to them must be reversed because the failure to name them individually in the written pre-penalty and penalty notices deprived the Court of International Trade of subject matter jurisdiction under 28 U.S.C. § 1582 and violated their right to due process.

A

The Husses' first argument is that the Court of International Trade lacked subject matter jurisdiction over the claim against them because the Customs Service failed to serve them individually with a written pre-penalty or penalty notice pursuant to 19 U.S.C. § 1592. In essence their argument is as follows. Section 1582 of Title 28 provided that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States—(1) to recover a civil penalty under [19 U.S.C. § 1592] * * *." No "civil penalty" exists under 19 U.S.C. § 1592 against a particular defendant unless the Customs Service has complied with all of the procedures of section 1592(b), including written pre-penalty and penalty notices with respect to that particular defendant. Because the Husses were never served at the administrative level with written notice of their potential individual liability for the penalty, no civil penalty exists as to them over which the Court of International Trade can exercise jurisdiction. Because compliance with the procedures of section 1592(b) is a prerequisite to the exercise of subject matter jurisdiction under 28 U.S.C. § 1582, the fact that they may have had actual notice of their potential personal liability for the penalty is simply irrelevant.

We find this line of argument unpersuasive. The instant action falls within the literal terms of 28 U.S.C. § 1582. It is one that "arises out of an import transaction" and that was commenced by

the United States to recover "a civil penalty" imposed under section 19 U.S.C. § 1592, albeit a penalty originally assessed against Priority and not against the Husses personally. In addition, nothing in the statute or its legislative history demonstrates that Congress intended to narrowly circumscribe the subject matter jurisdiction of the Court of International Trade to encompass only those suits brought by the Government against parties expressly named in the administrative proceedings. In fact, the language of the statute appear to suggest otherwise. Section 1592(e)(1) provides that "in any proceeding * * * commenced for the recovery of any monetary penalty claimed under this section—(1) *all issues*, including the amount of the penalty, shall be tried *de novo*" (emphasis added). Thus it appears that so long as some "civil penalty exists" the Court of International Trade can assume jurisdiction over any complaint to recover that penalty, and the issue of who is ultimately responsible for payment of the penalty is subject to *de novo* consideration.

Other considerations also compel us to conclude that Congress did not intend that formal compliance with each procedure set forth in 19 U.S.C. § 1592 as to every party that might be called upon to pay the penalty be a jurisdictional prerequisite to suit under section 1582. First, the rule proposed by the defendants would place an unduly heavy administrative burden on the Customs Service. To preserve its right to sue all possible parties, the Customs Service would have to delve into the records of each corporation subject to possible penalty to uncover the names of all corporate directors, officers, and shareholders, serve them with notice and grant them an opportunity to contest their personal liability. All directors, officers, and shareholders would have to be served because it is unlikely that the Customs Service would have the time, legal expertise, or even necessary information to determine whether, in a particular case, a particular shareholder, officer, or director might be accountable for the liabilities of the corporation. The Customs Service regulations implicity recognize this limitation by providing that notice is to be mailed to a party who the *facts-of-record* indicate has an interest in the property. *See* 19 C.F.R. § 162.31(a) (1985) (emphasis added).

Second, this rule would also permit those directly responsible for a violation of the customs laws to avoid liability, or, at the very least, to unduly delay enforcement of those laws. Owners and officers might choose to alter the nature of the corporation by dissolving the corporation or selling the assets or shares of the corporation after the United States has commenced suit, thereby precluding the Government from recovering the penalty or forcing it to return to the beginning of the administrative process.

Third, failure to provide adequate notice or opportunity to participate at the administrative level is generally not perceived as a jurisdictional prerequisite to an enforcement action brought by the

agency. *See, e.g., Small Refiner Lead Phase-down Task Force* v. *EPA,* 705 F.2d 506, 549 (D.C. Cir. 1983). Rather, these are perceived as mere procedural irregularities which are subject to harmless error analysis and which, unlike subject matter jurisdiction, are waivable.

Fourth, the defendants' claim here is in essence a claim that the agency has failed to exhaust administrative remedies. There is no doubt that the doctrine of exhaustion of administrative remedies applies to an agemcy seeking enforcement of administrative action prior to the completion of the administrative process. *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767–68 (1947). Exhaustion of administrative remedies is not strictly speaking a jurisdictional requirement and hence the court may waive that requirement and reach the merits of the complaint. *See generally* 4 K. Davis *Administrative Law* § 26.8 (1983) and cases cited therein. *But see Sims* v. *Schweiker,* 547 F. Supp. 752, 755 (N.D. Ill. 1982). In fact, Congress appears to have recognized this in cases such as the one at bar by granting the Court of International Trade some discretion to excuse the failure to exhaust administrative remedies. *See* 28 U.S.C. § 2637(d) ("In any civil action not specified in this action, the Court of International Trade shall, *where appropriate,* require the exhaustion of administrative remedies.") (emphasis added). *See also United States* v. *Bavarian Motors, Inc.,* —— F. Supp. ——, —— 4 C.I.T. 83, 86 (1982). In the case at bar, the trial court would have been amply justified in excusing the Government's failure to exhaust administrative procedures, if indeed its failure to individually notify the Husses in writing did constitute a failure to exhaust administrative procedures. *Cf. id.,* —— F. Supp. at ——, 4 C.I.T. at 86.

Finally, in our view, the defendants mistakenly characterize their lack of jurisdictional contention as one involving subject matter jurisdiction over the Government's claim in the Court of International Trade. Rather, their contention is more properly characterized as one involving personal jurisdiction. Even if such personal jurisdiction were a prerequisite at the pre-penalty notice stage, constructive notice would suffice or could be waived. Both of these elements were present here.

We therefore hold that the failure to serve corporate officers/directors/shareholders with written notice of their potential personal liability does not deprive the Court of International Trade of subject matter jurisdiction over a complaint against those persons to recover a civil penalty originally assessed against the corporation.

B

We also find no merit to the Husses' contention that they were deprived of due process by the Government's failure to serve them with written notice of their potential personal liability at the pre-penalty and penalty stages. We make this finding without deciding

whether the opportunity for a trial *de novo* afforded the Husses with all the process to which they were entitled. *See Nickey* v. *Mississippi*, 292 U.S. 393 (1934). Rather, we hold that Mr. and Mrs. Huss did receive due process at the administrative level.

As the trial court found, the record evidence demonstrates that Mr. Huss clearly had actual notice and understood that the Customs Service might sue him in his personal capacity to recover the penalty, and that he did present arguments to the District Director of Customs regarding his lack of personal culpability. He had also hired an attorney whom he apparently consulted regarding his personal participation in the attempted importation. As a result, his protestation on appeal that he has been prejudiced because he was unable to make an informed judgment regarding whether or not to pay the mitigated penalty is unavailing.

The record is less clear that Mrs. Huss had actual notice of her potential personal liability or that she had an opportunity to participate, as an individual, in the administrative proceedings. To be sure, the record shows that she did attend the first pre-penalty hearing with the Director and that Mr. Huss' attorney in his petition on behalf of the corporation did state that Mrs. Huss had been informed that she might be criminally prosecuted. This modicum of evidence, however, does not establish either actual notice or participation in any administrative proceedings in her personal capacity. In addition, the Government has suggested no reason why Mr. Huss' knowledge or activities on behalf of himself should be imputed to his wife. Thus we cannot agree with the trial judge that Mrs. Huss' due process objection can be dismissed because of her actual notice and personal participation at the administrative level.

Nonetheless on the narrow facts of this case, we uphold the trial judge's dismissal of Mrs. Huss' due process claim. At the time of the attempted importation, Mrs. Huss was one of only three officers of Priority and she concedes that she made the important decisions regarding the attempted importation. At this time Priority was a close corporation, with her husband being a fifty percent shareholder. Shortly thereafter, when the administrative proceedings were just under way, the Husses became the sole shareholders, employees, and officers of Priority. Although we recognize that the average person is not necessarily schooled in the legal intricacies of personal liability of officers and shareholders for a corporation's liabilities, we are of the view that as one of only two employees/officers/shareholders of a small family corporation, Mrs. Huss was or should have been aware that under certain circumstances she could be held accountable for Priority's liabilities.

It is also significant that she had access to the corporation's attorney whom she could have consulted, and perhaps did consult, regarding the probability of whether she might be called upon to pay some or all of the mitigated penalty. Under these limited facts, and in view of her admission that she was largely responsible for at-

tempting to import the bark tea, we believe that Mrs. Huss, at the very least, had constructive notice of her potential personal liability such that she should have consulted with Priority's lawyer about whether to pay the mitigated penalty or risk the imposition of a greater penalty at the trial court level. She was therefore accorded all of the process to which she was due.

The judgment of the trial court is affirmed.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-61)

SOUTH AFRICAN MARINE CORP., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 84-12-01757

OPINION AND ORDER

[Motion to dismiss granted.]

(Decided June 6, 1986)

O'Conner & Hannan (Myles J. Ambrose and *F. Gordon Lee)* for plaintiff.
Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, *Saul Davis,* Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff, South African Marine Corporation, Ltd. (SAM), a South African corporation engaged in the business of owning and operating ocean-going vessels, seeks to challenge the imposition of import fees on raw sugar it transported from Swaziland to the United States. Defendant moves to dismiss the claim for lack of jurisdiction. Defendant claims that plaintiff does not possess the statutory right to seek judicial review of the relevant administrative action.

The facts of this case are not in dispute. SAM entered into a contract with Swazi Sugar Corporation (Swazi), the exporter of record, to transport the subject sugar to the United States. Under the terms of the agreement, plaintiff guaranteed the arrival of the merchandise at the first sugar port in the United States before September 30, 1981.

Swazi then entered into a contract of sale for the full amount of the sugar with Czarnikow, Ltd. Czarnikow, Ltd., sold some of the sugar to Czarnikow, Inc., which sold the sugar to Philipp Bros., which sold the sugar to Imperial Sugar Co. (Imperial), the importer of record. Czarnikow, Ltd., sold the remainder of the sugar to Christman Trading Corp., which sold the sugar to Refined Syrups, which sold the sugar to Farr Man Co. Farr Man Co. sold some of the sugar to Imperial and the remainder to Coca Cola Co. Coca Cola sold the sugar to Imperial. All of the contracts involved pro-

vided that the sugar be sold on a duty-paid basis; consequently, each purchaser could deduct from the contract price any import fee imposed.[1] In this fashion, any import fee imposed on Imperial was to be passed up the chain of sale to Swazi.

Plaintiff's vessel containing the sugar arrived at the first United States port on October 1, 1981. A quarterly adjusted import fee became effective on the same date.[2] Consequently, the United States Customs Service (Customs) assessed an import fee against Imperial. Imperial paid the total import fee to Customs on October 1, 1981. On April 2, 1982, the entry was liquidated by Customs, resulting in a slight adjustment in the fee.[3] This adjusted fee was deducted from the contract price up the line of sellers to Swazi. In turn, pursuant to the contract between Swazi and SAM, SAM ultimately paid Swazi an amount based on the fee as damages for breach of contract.[4]

Plaintiff, Imperial, and Swazi jointly filed a protest challenging the imposition of the fee on June 29, 1982. Customs denied the protest on June 20, 1984. Plaintiff, independent of the other parties, brings this suit challenging the propriety of the imposition of the fee.[5]

Defendant claims that plaintiff does not fall within the statutory classes of parties who may protest an administrative decision and, subsequently, may contest denial of such a protest. Plaintiff counters that the government's failure to object to the propriety of the protest by SAM, at the time the protest was filed, prohibits it from now objecting on that basis to the filing of this action. Plaintiff contends that Customs was obligated to raise this issue when it considered and denied the protest. In addition, plaintiff contends that raising the issue at this stage in the proceedings is unduly prejudicial, presumably because the statute of limitations has run.

WAIVER

For plaintiff to bring a suit challenging the imposition of duties or fees, the suit must contest the denial of a valid protest filed by plaintiff. 28 U.S.C. §§ 1581(a), 2631(a) (1982). In *Shigoto International Corp.* v. *United States,* 66 Cust. Ct. 252, C.D. 4199 (1971), this

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[1] The Farr Man-Imperial contract does not contain a duty-paid clause. The parties agree, and close examination of the invoices involved demonstrates, however, that Farr Man and Imperial performed their obligations under the contract as if it contained a duty-paid clause.

[2] The import fee on raw sugar is charged at a fluctuating rate and is imposed in lieu of ordinary customs duties. Section 22 of the Agricultural Adjustment Act, as amended, authorizes the President of the United States to impose such fees by proclamation. 7 U.S.C. § 624 (1982). On December 28, 1978, President Jimmy Carter issued a proclamation providing for a quarterly adjusted fee on sugar. Proclamation No. 4631, 44 Fed. Reg. 1 (1978). See Section 22 Import Fees: Determination of Quarterly Import Fees on Sugar, 46 Fed. Reg. 48,274 (1981) for the calculation of the fees at issue in this case.

[3] The initial total import fee assessed was $540,136.80, based on a fee of 1.531 cents per pound on 35,280,000 pounds of sugar. The liquidation fee was $539,908.83, based on a discharge of 35,265,110 pounds of sugar. As a result, Customs issued a refund check of $227.97 following liquidation.

[4] Plaintiff actually compensated Swazi in the amount of $526,411.10, or 97.5% of the fee. As a result of an arbitration proceeding, Swazi accepted this sum from plaintiff in satisfaction of its prior contractual arrangement.

[5] Swazi was a plaintiff in this action when the summons was filed. SAM subsequently moved for amendment of the summons, striking Swazi as a plaintiff. Defendant noted no objection and the motion was granted.

court found, in a similar context, that the plaintiff lacked standing to protest a Customs decision because plaintiff was not among the parties listed in the statute as eligible to protest. *Id.* at 253. The court further found that the fact that the protest was denied on the merits did not affect this result because the Government's agent could not waive the statutory standing requirement for protest (and, consequently, suit), which it deemed jurisdictional.[6] *Id.*

This court has used the term "standing" to characterize this statutory issue in other cases as well. *See, e.g., Mohawk Recreation Products, Inc.* v. *United States,* 77 Cust. Ct. 180, 423 F. Supp. 932 (1976). Standing, however, is normally thought of as a judicially, rather than a statutorily, created precept. The standing requirement involves both considerations under the case and controversy provision of Article III of the Constitution and prudential questions as to whether plaintiff's interests fall within the zone of interests regulated or benefited by the statute or regulation being applied. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 471–76 (1982) (defines and distinguishes constitutional and prudential tests of standing); *Florsheim Shoe Co.* v. *United States,* 744 F.2d 787, 790 & n.4 (Fed. Cir. 1984) (same). When the proper party plaintiffs are defined in specific terms by statute, characterizing disputes over who may sue as "standing" problems may lead to confusion.[7] However one characterizes the problem here, it remains one involving the *statutory* limits on who may sue and, consequently, what suits may be heard by the court. *Shigoto* clearly supports the principle that such statutory proscriptions may not be waived by acts of omission of government agents, such as failure to reject a protest.

Statutory Eligibility To Sue

The administrative protest, which is a prerequisite for suit under 28 U.S.C. § 1581(a), may challenge only certain actions by Customs, 19 U.S.C. § 1514(a)(1982 & Supp. II 1984), and may be filed only by certain classes of people. *Id.* § 1514(c)(1). The parties agree that the transaction at issue falls within one of two categorized subjects of protest: 1) the classification and rate and amount of duties chargeable, or 2) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury. *Id.* § 1514(a)(2) & (3). The parties disagree, however, as to whether plaintiff fits within any of the specified classes of persons who may file a protest. The parties do agree that the relevant classes of protestants are the importers or consignees shown on the entry papers, their sureties, any person paying any charge or exaction, or any authorized agent

[6] "Subject-matter jurisdiction * * * is an Art. III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982). Due to these characteristics, principles of estoppel do not apply. *Id.* at 702 (citing *American Fire & Casualty Co.* v. *Finn,* 341 U.S. 6, 17–18 (1951)).

[7] Closely related and often confused with standing are the concepts of "capacity" and "real party in interest." *See* 6 Wright and Miller, *Federal Practice and Procedure* Civil § 1542 at 639 (1971).

of any of the above persons. *Id.* § 1514(c)(1)(A), (B), & (E). Defendant contends that plaintiff is not within any of the specified classes. Plaintiff contends that it is a "person *paying* any charge or exaction."[8] *Id.* § 1514(c)(1)(B) (emphasis added). Therefore, at the outset, the court will determine whether or not plaintiff *paid* the fee within the meaning of the statute. If plaintiff did not *pay,* the court need not decide whether the fee is a charge or exaction or is a duty which is not a charge or exaction.[9]

The statute at issue, 19 U.S.C. § 1514(c) (1982), if described generally, permits persons who have a close relationship to an import transaction to protest, and thus, to sue. Therefore, it is important to determine exactly the natue of plaintiff's relationship to the transaction which is the subject of the challenged determination.

Plaintiff here was a shipper. It was not a seller in a chain of sales on a duty-paid basis and it was not directly involved in the entry or import process. Plaintiff paid an amount equivalent to 97.5% of the amount of the fee to a seller in the chain of sale, in satisfaction of a claim for late delivery of the goods; it did not pay anything directly to Customs. Certainly, plaintiff's status as a shipper did not render it legally or contractually obligated to pay the fee; it was only when its own conduct contributed to the imposition of the new fee on the goods that plaintiff's potential interest in the fee issue arose. Plaintiff's closest connection to the customs transaction is that it became obligated to pay an amount almost equivalent to the amount of the fee paid, as consequential damages for a breach of a contract term.

This court has stated that to contest the denial of a protest and to obtain a refund of customs duties, a party must have "some direct connection to the customs transaction at issue." *Parksmith Corp.* v. *United States,* 77 Cust. Ct. 102, 103, 428 F. Supp. 1094, 1095 (1976). Although one might argue that *Parksmith* is distinguishable from the case at hand in that it dealt with a voluntary purchaser of a chose-in-action of the entity entitled to protest, it is nonetheless instructive. *Parksmith* addressed the issue of the applicability of the Anti-Assignment Act, 31 U.S.C. § 203.[10] One purpose of the Anti-Assignment Act is to prevent a multiplicity of parties with whom the government must deal and to enable the government to know with whom it is dealing until the transaction is closed. *Hobbs* v. *McLean,* 117 U.S. 567, 576 (1886); *Patterson* v. *United States,* 354

[8] Plaintiff does not claim to be an importer, a consignee, a surety, an agent, or a subrogee of any of these persons.

[9] There is support for the proposition that the term "charge or exaction" excludes "ordinary duties," see, *e.g., Alberta Gas Chemicals* v. *Blumenthal,* 82 Cust. Ct. 77, 81-82, 467 F. Supp. 1245, 1249-50 (1979), but the cases which make the distinction arise in other contexts and do not discuss 19 U.S.C. § 1514(c), or its predecessors. Furthermore, in *United States* v. *Wedemann & Godknecht, Inc.,* 62 CCPA 86, 88, 515 F.2d 1145, 1147 (1975), the Court of Customs and Patent Appeals clearly assumed that for purposes of determining *who* could protest, the words "charges or exactions" included "duties." 19 U.S.C. § 1514 was amended in both 1970 and 1979. The legislative history of the amendments is not particularly illuminating as to whether *Wedemann* remains valid on this point.

[10] The Anti-Assignment Act was not addressed to any great degree by the parties here, and the limitations of § 1514(c) make it unnecessary to decide the direct relevance of the Anti-Assignment Act to the facts at hand.

F.2d 327, 329 (Ct. Cl. 1965). Section 1514(c) similarly operates to limit the number of parties who may bring suit, and presumably it has some of the same purposes as the Anti-Assignment Act. Conceivably, without the limitations of section 1514(c), the government might have been faced with protests from six or seven parties in this case. (Indeed, three parties protested.) Obviously, this could create administrative problems, as well as the problems associated with multiple-party litigation or successive suits.

Plaintiff argues that it is the only party interested in pursuing this challenge to the imposition of the import fee and that it must be allowed to proceed in the interest of justice, that is, that it is the only real party in interest. It seems all other parties in this chain of sale have been compensated, at least to 97.5% of the duties paid. Whether or not other parties remain interested, however, is not determinative. If the obligation of other parties to pursue this claim is not contractually implied, plaintiff arguably could have expressly contracted for the seller it dealt with to require the importer, through contracts with others in the chain of sale, to pursue any reasonable objections to fees imposed. Alternatively, plaintiff might have contracted as part of its latest agreement with Swazi for Swazi to do whatever it could to pursue the claim. Even if the court believed that these two options were unavailable and that as a matter of fairness plaintiff should be able to pursue its claim, the court cannot rewrite the statute.

Plaintiff cites *Pasco Terminals Inc.* v. *United States*, 65 CCPA 28, 567 F.2d 976 (1977), and *United States.* v. *Wedemann & Godknecht, Inc.*, 62 CCPA 86, 515 F.2d 1145 (1975), for the proposition that section 1514 should be liberally construed and that a real party in interest may protest and bring suit. First, plaintiff misapprehends the meaning of real party in interest. Because plaintiff is in the position similar to that of an assignee of a claim, and would appear to be the entity possibly benefiting from the suit, at first glance it would seem to fit into the real party in interest category. *See infra* discussion of CIT Rule 17(a) The real party in interest, however, is the entity which under sustantive law has the right sought to be enforced. 3A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 17.07 at 17-65 (2nd ed. 1985) (hereinafter cited as *Moore*). Inasmuch as the right to protest and sue is purely the creature of statute, the requirements of section 1514(c) are part of the applicable substantive law, and thus, section 1514(c) specifies who is a real party in interest.[11] Note, as well, that unlike the ordinary real party in interest, plaintiff here is not to be the direct recipient of any funds ordered paid. *See infra* note 14. Furthermore, the possibility of obtaining a benefit as a result of litigation does not make one a real party in interest. *Armour Pharmaceutical Co.* v. *Home Insurance*

[11] *Moore, supra*, ¶ 17.14 at 17-168, indicates that Fed. R. Civ. P. 17(a), mandating suit by the real party in interest, recognizes vesting of the substantive right to sue in a person statutorily authorized to sue.

Co., 60 F.R.D 592 (N.D. Ill. 1973) (Excess insurance carrier was not real party in interest.).

Second, both *Wedemann* and *Pasco* are factually distinguishable from the instant case. *Wedemann* involved a suit by a seller's broker which processed entries and paid duties through another broker. Although the majority opinion constructs an unusual agency relationship to fit the peculiarities of an earlier version of section 1514,[12] both the majority and concurring opinions voice concern that the entity overseeing the customs entry process should not be precluded from suit due to the technical error of not having its agent sign the protest. Note that in *Wedemann* the actual seller under the "duty paid" contracts, that is the one who would ultimately benefit from a judgment for plaintiff, is not even a party to the suit. *Wedemann* is very much concerned with defects in what is viewed by the court as "procedure" and there is no doubt that the court was convinced that Wedemann was substantially and directly involved in the import transaction. The court also notes that the person who was clearly entitled to sue under the statute had "ratified" the action and that there was no chance of double liability.[13] In fact, the court states that any refund would go to the second broker who actually *paid* Customs and not to plaintiff. Presumably, the broker, who was hired by Wedemann to pay Customs, would pass along any refund to Wedemann. There is no such clear relationship between the party who paid Customs and plaintiff here.[14] *Pasco* is similarly inapplicable. The *Pasco* court notes that Pasco paid the duties. Pasco did so either directly or through reimbursement in accordance with a direct contractual obligation to pay duties. The court virtually ignored the fact that Pasco was not, in an ordinary sense, an "agent of the person paying" as the then existing statute seemed to require, but rather focused on Pasco's relationship to the import transaction.

The statutory amendment enacted after the *Wedemann* and *Pasco* decisions, which eliminated the incongruity of a statute which seemingly allowed an agent, but not the principal, to protest, did not broaden section 1514 to allow any person affected by a duty obligation to protest. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 254, *reprinted in* 1979 U.S. Code Cong. & Ad. News 381, 640. As amended, section 1514 allows importers, consignees, sureties, persons paying charges or exactions, or the agents of these persons to protest, and ultimately, to sue. If Congress wanted anyone with a possible financial interest in the outcome of the dispute to be able to

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[12] The pre-1970 version of 19 U.S.C. § 1514 allowed "the importer, consignee, or agent of the person paying such charge or exaction" to protest, seemingly indicating in the last case that the agent, but not the principal, may sue. The final "of" may have been a drafting error. *See Wedemann*, 62 CCPA at 93, 515 F.2d at 1150 (Miller, J., concurring).

[13] Presumably it is because of the unusual agency relationship found in *Wedemann* that the court found ratification applicable. That is, the party which ratified Wedemann's act was held, in essence, to be a principal of Wedemann, *See also Baylis Brothers Co. v. United States*, 75 Cust. Ct. 89, 400 F. Supp. 940 (1975). The majority opinion made no mention of Fed. R. Civ. P. 17(a) principles, although it is possible that it had such in mind.

[14] Under 19 C.F.R. § 34.36 (1985) any refund paid in this case would go to Imperial, as importer of record. Imperial is not under the control of plaintiff and is not its agent or principal.

protest and sue, it would have been easy enough to so provide, or it could have allowed judicially developed tests of real party in interest or standing to govern. As defendant has argued, the fact that the statute lists specific parties as eligible to bring suit and is silent with regard to other potential plaintiffs implies exclusion. This principle of statutory construction, *expressio unius est exclusio alterius,* is applicable here. *See National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453, 457–58, *reh'g denied,* 415 U.S. 952 (1974). The court does not find the legislative history of the amendment to demonstrate an intent which is contrary to the language of the Statute. Congress clearly intended to eliminate a situation where an agent, but not its principal, could sue. The legislative history implies nothing more. Furthermore, *Wedemann* and *Pasco* stand for the principle that section 1514 should be liberally construed to avoid denying a party a day in court on a mere technicality where the essential intent of Congress is met. They do not stand for the principle that the categories set forth in section 1514 are meaningless. Plaintiff here has more than a technical problem. It paid damages calculated with regard to the section 22 fee, it did not pay the section 22 fee, and it may not protest or bring suit challenging the imposition of the fee.

CIT Rule 17(a)

In view of its conclusion that plaintiff is not a real party in interest under the statute, the court asked the parties whether CIT Rule 17(a) is applicable to this case.[15] Plaintiff argues that it is, and requests time to seek ratification by Imperial, a statutory real party in interest. Defendant asserts, in essence, that allowing ratification would contravene the purpose of the applicable statutes.

CIT Rule 17(a) is not merely a local rule of this court.[16] It mirrors Fed. R. Civ. P. 17(a), which has both Supreme Court and Congressional approval. Furthermore, the rule codifies longstanding equity practice. *Moore, supra,* ¶ 17.08 at 17–81. Nonetheless, Rule 17(a) may not be used to defeat Congressional intent as manifested in applicable statutes, but should be used to prevent forfeiture and injustice where the determination as to who may sue is difficult. *See* Notes of the Advisory Committee on 1966 amendment to Fed. R. Civ. P. 17 and *Moore, supra,* ¶ 17.14 at 17–168 to 17–169 and ¶ 17.15–1 at 17–182. Therefore, the issue is whether ratification

[15] CIT Rule 17(a) reads as follows:

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

[16] CIT Rule 17(a) has been utilized, although sparingly. *See, e.g., Zenith Radio Corp.* v. *United States,* 5 CIT 155 and 178 (1983).

here under Rule 17(a) is in accord with Congressional intent. This requires an examination of both the purpose and intent of Rule 17(a) and the relevant statutory provisions, specifically, 19 U.S.C. § 1514, 28 U.S.C. § 2631(a), and 28 U.S.C. § 2636(a), as applied in this case.

Initially, the court notes that 19 U.S.C. § 1514 (1982 & Supp. II 1984) has been satisfied. Imperial has protested along with plaintiff. Thus, Customs was not put in the position of processing an invalid protest. 28 U.S.C. § 2631(a) (1982) provides, however, that only persons who protest under section 1514, or their sureties, may bring this type of suit. Presumably, the purpose is to limit suit to those who exhaust their administrative remedies. Obviously, plaintiff is not such a person because, as indicated previously, it had no remedies to exhaust. Nonetheless, the statute would be met if Imperial, which exhausted its remedies, did join in the action.

This does not end the inquiry, however, because Imperial's rights have been curtailed by 28 U.S.C § 2636(a) (1982), the applicable statute of limitations, which has run. Nevertheless, courts have recognized that even where the United States is defendant, substitution of the real party in interest will relate back to the time of filing of the original complaint so as to prevent a bar by the intervening statute of limitations. *See Cummings* v. *United States,* 704 F.2d 437 (9th Cir. 1983), (insurer substituted for insured in suit under the Federal Tort Claims Act); *Wadsworth* v. *United States,* 511 F.2d 64 (7th Cir. 1975) (same). This is so, even if the statute of limitations is jurisdictional. *Executive Jet Aviation, Inc.* v. *United States,* 507 F.2d 508 (6th Cir. 1974). In each of these cases the statute of limitations policy of barring stale claims was not offended because plaintiff brought suit in a timely manner.[17] Note, however, that in these three cases, it was clear that the original plaintiff, at least at one time, possessed a claim against the United States. The original plaintiff merely lost its right to pursue the claim when its insurer paid the claim. *See also Scanwell Laboratories, Inc.* v. *Thomas,* 521 F.2d 941 (2nd Cir. 1975), *cert. denied,* 425 U.S. 910 (1976) (continuation of suit by original plaintiff/owner allowed after improper assignment rescinded and claim reverted to original owner). Thus, in these cases, notice within the limitations period of a potentially valid action was somewhat better than it would have been if a stranger to the cause of action had sued. In this case, plaintiff is essentially a stranger to the cause of action.

"The meaning and object of the real party in interest principle embodied in Rule 17 is that the action must be brought by a person who possesses the right to enforce the claim and who has a signifi-

[17] As stated in *Executive Jet,* 507 F.2d at 515, (quoting *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U.S. 342, 348–49 (1944)):

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

cant interest in the litigation." *Virginia Electric & Power Co.* v. *Westinghouse Electric Corp.*, 485 F.2d 78, 83 (4th Cir. 1973), *cert. denied*, 415 U.S. 935 (1974). Furthermore, as the Advisory Committee on the Federal Rules of Civil Procedure stated with regard to the 1986 amendments to Rule 17(a):

> The provision that no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after the objection has been raised, for ratification, substitution, etc., is added simply in the interest of justice. In its origin the rule concerning the real party in interest was permissive in purpose: it was designed to allow an assignee to sue in his own name. That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata.

In this case, Imperial had the statutory and regulatory right to bring suit and to obtain any refund ordered, but it has refused to sue in its own name in a timely manner and to date, it has refused to join in this action. Imperial is certainly not in the position of an assignee of a claim or a statutory representative with vital interests in the litigation. Adding Imperial to this action would be adding an uninterested party to the suit. In addition, there was no confusion here as to whether Imperial could sue. Imperial always had that option and it would not exercise it. Its failure to sue was not the result of inadvertence. Compare the case at hand to *Levinson* v. *Deupree*, 345 U.S. 648 (1953), where an administrator of a decedent's estate was allowed to continue suit although he was not validly appointed under Admiralty procedure until after the statute of limitations had run. Essentially, the *Levinson* court did not allow a technicality to work an injustice, but instead permitted a party concerned with the litigation, and fully authorized by law to pursue it, to proceed with suit.

The court is also mindful of one additional phrase in Rule 17(a). Under Rule 17(a), the court need only allow a reasonable time after objection for ratification or joinder.[18] Defendant's motion was made some months ago, although the basis for the motion was not phrased in the exact terms of a real party in interest objection. For that reason, plaintiff might argue that it was only notified of this problem when it was raised by the court a few weeks ago. Sufficient time has elapsed, however, for plaintiff and Imperial to have rectified any mere inadvertence or technicality. It is clear that the problems plaintiff seeks to correct are due to simple mistakes, and thus, are not those intended to be remedied by Rule 17(a).

[18] Apparently, joinder or substitution is more common than ratification. *Moore*, *supra*, ¶ 17.15-1 at 17-184.

In view of all of the factors mentioned above, the court does not believe that waiting for plaintiff to bargain for the participation of Imperial will serve the purposes of Rule 17(a) or of the relevant statutes. Defendant's motion to dismiss is granted.

ABSTRACTED CLASS

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESS
				Item No. a
C86/89	DiCarlo, J. May 30, 1986	Pharmacia Inc.	73-12-03543-S	Item 711.88 11%
C86/90	DiCarlo, J. May 30, 1986	Pharmacia Inc.	74-4-00964	Item 711.88 774.60 10%, 11% or 15%
C86/91	Newman, S.J. May 30, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-5-00528	Item 682.25 12.5%
C86/92	Newman, S.J. May 30, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01704	Item 682.25 11.8%
C86/93	Newman, S.J. May 30, 1986	C.J. Tower & Sons of Buffalo, Inc.	81-12-01722	Item 682.25 12.5%
C86/94	Newman, S.J. May 30, 1986	Novatronics of Canada, Ltd.	84-4-00595	Item 682.25 9.6%
C86/95	Aquilino, J. June 4, 1986	IDEC Systems & Control Corp.	85-3-00331	Item 715.66 715.68 Various r

CLASSIFICATION DECISIONS

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
n No. and rate	Item No. and rate		
711.88 %	Item 661.95 5.5%	Pharmacia Fine Chemicals, Inc. v. U.S. S.O. 85-92	New York Sephadex Column KS 370, etc.
711.88 or 4.60 %, 11%, 8.5%, or 15%	Item 661.95 10%, 6.5% or 5.5%	Pharmacia Fine Chemicals Inc. v. U.S. S.O. 85-92	New York Column Segment KS 380/15 complete with lids
682.25 .5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
682.25 .8%	Item 682.30 5.8%	Agreed statement of facts	Buffalo-Niagara Falls Motors
682.25 .5%	Item 682.30 6%	Agreed statement of facts	Buffalo-Niagara Falls Motors
682.25 6%	Item 682.30 5.1%	Agreed statement of facts	Buffalo-Niagara Falls Motors
715.66 or 5.68 arious rates	Item 685.90 6.9% or 6.5%	U.S. v. Texas Instruments Inc., 673 F.2d 1375 (1982)	San Francisco Electronic timers

ABSTRACTED VALU

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUA
V86/169	Aquilino, J. May 30, 1986	Ayerst Laboratories	85-2-00246	Transaction value
V86/170	Watson, J. June 4, 1986	Eli E. Albert Inc.	R58/15347, etc.	Export value

VALUATION DECISIONS

VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
value	$223.74 per kilogram	Agreed statement of facts	Champlain Rouses Pt. Propranolol Hydrochloride Spheroids Bulk
	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Binoculars

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

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